

**STATE OF TEXAS  
DEPARTMENT OF INFORMATION RESOURCES**

**CONTRACT FOR SUN MICROSYSTEMS PRODUCTS AND RELATED  
SERVICES**

**Sun Microsystems, Inc.**

**1. Introduction**

**A. Parties**

This Contract for products and related services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter "DIR") with its principal place of business at 300 West 15<sup>th</sup> Street, Suite 1300, Austin, Texas 78701, and SUN MICROSYSTEMS, INC., (hereinafter "Vendor"), a Delaware corporation with its principal place of business at 4150 Network Circle, Santa Clara, California 95054.

**B. Compliance with Procurement Laws**

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Texas Building and Procurement Commission's Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-097, on November 17, 2006, for Sun Microsystems Products and Related Services. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-097 shall be posted by DIR on the Electronic State Business Daily.

**C. Order of Precedence**

This Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing; Appendix D, Software License Agreement; Appendix E, Service Agreement; Appendix F, Master Lease Agreement; Exhibit 1, Vendor's Response to RFO DIR-SDD-TMP-097, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-097, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Appendix F, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

**2. Term of Contract**

The term of this Contract shall be one (1) year commencing on the last date of

approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend the Contract, upon mutual agreement, for up to three (3) optional one-year terms.

### **3. Product and Service Offerings**

#### **A. Products**

Products available under this Contract are limited to the products described in Appendix C. Vendor may incorporate changes to their product offering; however, any changes must be within the scope of products awarded based on the posting described in Section 1.B above.

#### **B. Services**

Services available under this Contract are limited to the services described in Appendix C. Vendor may incorporate changes to their service offering; however, any changes must be within the scope of services awarded based on the posting described in Section 1.B above.

### **4. Pricing**

#### **A. Manufacturer's Suggested Retail Price (MSRP)**

MSRP is defined as the product sales price suggested by the manufacturer or publisher of a product.

#### **B. Customer Discount**

The minimum Customer discount for all products and services will be the percentage off MSRP as specified in Appendix C.

#### **C. Customer Price**

1) The price to the Customer shall be calculated as follows:

$$\text{Customer Price} = \text{MSRP} - \text{Customer Discount}$$

2) Customers purchasing products and services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request. Vendor agrees it shall offer and make available this DIR Contract as first choice for all sales of Products and Services identified in Section 3. above to eligible Texas DIR Customers during its term.

3) Vendor agrees to extend to DIR the Western States Contracting Alliance (WSCA) catalog level, standardized discounts in the event DIR standard pricing discounts, contained within Appendix C, are exceeded by the WSCA contract discounts. This extension of competitive volume sales pricing is

intended solely to ensure that DIR will, at a minimum, remain competitive with the standard price rates set for WSCA. DIR may not apply, without the express consent of Vendor, any pre-existing discount structure to the WSCA pricing being offered to DIR by Vendor. In the event that DIR discounts fail to remain competitive to WSCA standardized, catalog level discounts, Vendor shall extend such discounts to DIR. Vendor shall use its commercially reasonable efforts to notify DIR of such WSCA discount change and amend this Contract within thirty (30) days after the amendment to the Vendor's WSCA level discounts. The introduction of the WSCA discounts shall be progressive from the date of execution into the Contract by amendment. Both parties agree that the discounts shall not be retroactive for DIR and shall not extend back to the date that Vendor reduced WSCA catalog discounts. Further the parties agree that DIR, or the State of Texas, does not have the right to audit the WSCA contract held by the Vendor. References to the Vendor's WSCA contract are only contained in this Contract for purposes of referencing the pricing discounts contained therein. Both parties acknowledge that the Vendor's WSCA contract and pricing are readily available to the public and may be freely accessed by the internet for the purposes of validation under the terms and conditions of this Contract.

**D. DIR Administrative Fee**

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

**E. Shipping and Handling Fees**

The price to the Customer under this Contract shall include all shipping and handling fees. Shipments will be Free On Board Customer's destination. No additional fees shall be charged to the Customer for standard shipping and handling. If the Customer requests expedited delivery, Customer will be responsible for any charges for expedited delivery.

**F. Tax-Exempt**

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

**G. Travel Expense Reimbursement**

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized by the current State Travel Regulations. Travel time may not be included as part of the amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section

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5 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer.

**H. Changes to Prices**

Vendor may change the price of any product or service at any time, based upon changes to the MSRP, but discount levels shall remain consistent with the discount levels specified in this Contract. Price changes shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately in all quotes issued after the price change takes effect.

**5. DIR Administrative Fee**

**A.** The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is one percent (1%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$1,000. The total Administrative Fee due shall not be less than \$130,000 for any given annual Contract term ("Annual Commitment"). If it is determined during preparation of the final monthly report of an annual Contract term that Vendor has not met its Annual commitment, Vendor will include the additional funds in the check for the final month of the annual Contract term to meet the Annual Commitment. Should this Contract expire or terminate prior to the end of any given annual Contract term, the Annual Commitment due for the Contract term shall be prorated based on the actual number of days of the term. In the event total Customer sales under this Contract reach \$13,000,000 within any given annual Contract term, the administrative fee to be paid by the Vendor shall be decreased to three quarters of one percent (.75%) for the remainder of that annual Contract term.

**B.** All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to the Vendor. At the beginning of each annual Contract term, Vendor and DIR may agree to change the administration fee to 2%, and remove the requirement for the Annual Commitment. Any change in the administrative fee shall be incorporated in the price to the Customer in the form of an amendment to this Contract to adjust discounts to account for the change in administrative fee. For example, if the administrative fee is increased by 1%, then discounts will be decreased by 1%.

**6. Notification**

All notices under this Contract shall be sent to a party at the respective address indicated below.

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If sent to the State:

Sherri Parks, Service Delivery Division  
Department of Information Resources  
300 W. 15<sup>th</sup> St., Suite 1300  
Austin, Texas 78701  
Phone: (512) 475-4700  
Facsimile: (512) 475-4759  
Email: sherri.parks@dir.state.tx.us

If sent to the Vendor:

Randy Russell  
Sun Microsystems  
5300 Riata Park Court  
Austin, Texas 78727  
Phone: 877-263-2198  
Facsimile: 512-857-1518  
E-mail: randy.russell@sun.com

**7. Software License and Service Agreements**

**A. Software License Agreement**

1) Customers acquiring software licenses under the Contract shall hold, use and operate such software subject to compliance with the Software License Agreement set forth in Appendix D of this Contract. No changes to the Software License Agreement terms and conditions may be made unless previously agreed to between Vendor and DIR. Customers may not add, delete or alter any of the language in Appendix D. Order Fulfiller shall make the Software License Agreement terms and conditions available to all Customers at all times.

2) Compliance with the Software License Agreement is the responsibility of the Customer. DIR shall not be responsible for any Customer's compliance with the Software License Agreement. If DIR purchases software licenses for its own use under this Contract, it shall be responsible for its compliance with the Software License Agreement terms and conditions.

**B. Shrink/Click-wrap License Agreement**

Software provided in conjunction with the Equipment is licensed to Customer under the license provided by the software publisher or by the equipment manufacturer with which the software is provided. Customer shall, if required, execute a separate software license agreement in a form satisfactory to the software publisher or equipment manufacturer.

**C. Service Agreement**

Services provided under this Contract shall be in accordance with the Service Agreement as set forth in Appendix E of this Contract. No changes to the Service Agreement terms and conditions may be made unless previously agreed to by Vendor and DIR.

**8. Master Lease Agreement**

The parties agree to the terms and conditions, as stated in Appendix F, Master Lease Agreement, attached hereto.

**9. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts.**

**1. Appendix A. Section 6. Contract Fulfillment and Promotion, A. Service, Sales and Support of the Contract,** paragraph 1 is restated in its entirety as follows:

**A. Service, Sales and Support of the Contract**

Vendor shall provide service, sales and support resources to serve all Customers throughout the State. DIR and Vendor shall use commercially reasonable efforts to ensure that potential Customers are made aware of the existence of the Contract. Vendor shall use its best efforts to ensure that potential Customers are made aware of the existence of the Contract

**2. Appendix A. Section 6, B, 4) Order Fulfiller Pricing to Customer** is replaced in its entirety as follows:

**4) Order Fulfiller Pricing to Customer**

Order Fulfiller pricing to the Customer shall comply with the Customer price as stated within Section 4 of the Contract. Order Fulfiller pricing to the Customer shall be, at a minimum, based upon the Customer price set forth in Appendix C. Appendix C Pricing shall be restricted to Customers for sales that pass through the Contract. This restriction is intended only to ensure that Customers receive the approved Vendor Pricing in Appendix C for Customers and it is not intended to be a general restriction or prohibition of the Vendor or the Order Fulfiller regarding their ability to price products and services.

**3. The following clause is added to Appendix A. Section 6, G. Vendor and Order Fulfiller Logo:**

**G. Vendor and Order Fulfiller Logo**

"Vendor Trademarks" means all names, marks, logos, designs, trade dress and other brand designations used by Vendor in connection with Vendor's products and services. DIR may refer to Vendor's products and services by their associated names, provided that such reference is not misleading and complies with Vendor's

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Trademark and Logo Policies, which are found at <http://www.sun.com/policies/trademarks>. DIR may not remove or alter any Vendor Trademarks, nor may it co-logo Vendor's products or services. DIR agrees that any use of Vendor Trademarks by DIR will inure to the sole benefit of Vendor. DIR agrees not to incorporate any Vendor Trademarks into DIR's trademarks, service marks, company names, Internet addresses, domain names, or any other similar designations.

4. **Appendix A. Section 6, K. DIR Cost Avoidance**, is restated in its entirety as follows:

K. DIR Cost Avoidance

Vendor will cooperate with DIR to provide mutually agreed upon data to support DIR's requirement to assess DIR's cost avoidance.

5. **Appendix A. Section 9. Vendor Responsibilities A. Indemnification 1) Acts or Omissions** is restated in its entirety as follows:

1) Acts or Omissions

Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents, and employees (the "Indemnified Parties") from and against all claims, actions, suits, demands, proceeding, costs, damages and liabilities, arising out of, or resulting from any negligent acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as requested by DIR. To the extent permitted by Texas state law, the Indemnified Parties agree to be responsible for their own acts, errors or omissions pertaining to this Indemnification provision.

6. **Appendix A. Section 9. Vendor Responsibilities A, Indemnification 2) Infringements** is restated in its entirety as follows:

2) Infringements

9.1. Vendor will defend or settle, at its option and expense, any legal proceeding brought against DIR or Customer (for purposes of this Section 9, collectively, "DIR") to the extent that it is based on a claim brought by a third party that products and services as provided by the Vendor infringe such third party's patent or copyright or misappropriate such third party's trade secret ("IP Claim"), and will indemnify the DIR against all damages and costs attributable exclusively to such claim awarded by the court finally determining the case, provided that the DIR:

- (a) gives written notice of the IP Claim to the Vendor promptly after learning of the IP Claim;
- (b) gives the Vendor sole control of the defense and settlement of the IP Claim;
- (c) provides to the Vendor, at the expense of the Vendor, all available information, subject to Vendor coordinating defense and settlement issues with the Texas Office of the Attorney General for State Agency customers, and assistance; and
- (d) does not compromise or settle the IP Claim.

9.2. If such provided products and/or services are found to infringe or misappropriate pursuant to an IP Claim, or in the reasonable opinion of the Vendor are likely to be the subject of an IP Claim, the Vendor will at its option:

- (a) obtain for the DIR the right to use such provided products and/or services;
- (b) replace or modify such provided products and/or services in such a way that (i) they become non-infringing and non-misappropriating and (ii) they substantially perform in the same manner or substantially provide the same results, or there is no material adverse effect in their overall performance; or
- (c) if neither (a) nor (b) is reasonably achievable, remove such provided products and/or services and refund to the DIR the original price paid therefore less net benefits realized by the DIR through accumulated depreciation or expensing thereof, up until the date of removal.

9.3 Notwithstanding anything to the contrary, and for the avoidance of doubt, Sections 9.1 and 9.2 do not apply to, and neither party has any obligation or liability of any kind for, any IP Claim arising from:

- (a) compliance by the Vendor with the designs or specifications of the DIR;
- (b) modification of such provided products and/or services that are not specifically authorized by a future written authorization signed by a Vice President of the Vendor;
- (c) use of an allegedly infringing version of such provided products and/or services, if the alleged infringement could have been avoided by the use of a different version made available to the DIR;
- (d) a combination comprising such provided products and/or services in combination with any third party services, hardware, software, data, or other materials;
- (e) a violation of the Vendor's license grant; or
- (f) any separate or component hardware, software or other materials to the extent it comprises any third party open source or freeware technology, or any derivatives or other adaptations thereof, and any combination that includes any of the foregoing.

9.4 This Section 9 states the entire liability of Vendor and the exclusive remedies of DIR for any proceedings or claims that any product or service infringes or misappropriates a third party's intellectual property.

**7) Appendix A. Section 9. Vendor Responsibilities B. Vendor Certifications**  
is hereby restated in its entirety as follows:



**B. Vendor Certifications**

Vendor certifies that, to the best of its knowledge, it and its designated Order Fulfillers: (i) have not given, offered to give, and do not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the Contract, (ii) are not currently delinquent in the payment of any franchise tax owed the State of Texas and are not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge the Contract may be terminated and payment withheld if this certification is inaccurate, (iii) neither they, nor anyone acting for them, have violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, (iv) have not received payment from DIR or any of its employees for participating in the preparation of the Contract, (v) under Section 2155.004, Texas Government Code, the vendor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate, (vi) to the best of their knowledge and belief, there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on the ability to fulfill their obligations under the Contract, (vii) are not suspended or debarred from doing business with the federal government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration, and (viii) as of the effective date of the Contract, are not listed in the prohibited vendors list authorized by Executive Order #13224, *"Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism"*, published by the United States Department of the Treasury, Office of Foreign Assets Control. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.4441, Texas Government Code, in fulfilling the terms of the Contract.

**8) Appendix A. Section 9. Vendor Responsibilities J. Limitation of Liability** is restated as follows:

**J. Limitation of Liability**

9.1 To the extent not prohibited by applicable law: (i) Vendor's maximum aggregate liability for all claims relating to this Contract, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million US dollars (U.S. \$2,000,000) , or, in the case of purchases, to the amount paid to Vendor during the previous twelve (12) months for the product or service which is the subject matter of the claim up to a maximum of two million US dollars (\$2,000,000); and (ii) none of the parties will be liable for any indirect, punitive, special, incidental or consequential damages in connection with or

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arising out of the Contract (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Contract fails of its essential purpose.

9. The following sentence is added to the end of **Appendix A. Section 9. Vendor Responsibilities. K. Overcharges:**

**K. Overcharges**

Vendor's assignment of any claim to the DIR will be limited to only that portion of the claim that corresponds to the amount of the overcharge to Customers for purchases made under this Contract.

This Contract is executed to be effective as of the date of last signature.

<p><b>SUN MICROSYSTEMS, INC.</b></p> <p><b>Authorized By: <u>Signature on File</u></b></p> <p><b>Name: <u>Robert Lavine</u></b></p> <p><b>Title: <u>Director, State &amp; Local Govt</u></b></p> <p><b>Date: <u>03/13/07</u></b></p>	<p><b>The State of Texas, acting by and through the Department of Information Resources</b></p> <p><b>Authorized By: <u>Signature on File</u></b></p> <p><b>Name: <u>Cindy Reed</u></b></p> <p><b>Title: <u>Interim Director of Service Delivery</u></b></p> <p><b>Date: <u>03/14/07</u></b></p> <p><b>Legal: <u>CJK 03/14/07</u></b></p>
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